Nos. 435 and 436

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

No. 436

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BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit in No. 435 (N. R. 216–225)[1] is reported at 245

[1] The designation "N. R." refers to the printed record in No. 435, *Federal Trade Commission* v. *National Casualty Company*, and the designation "A. R." refers to the printed record in No. 436, *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*.

F. 2d 883. The opinion of the Court of Appeals for the Fifth Circuit in No. 436 (A. R. 110–117) is reported at 243 F. 2d 719. The opinions of the Federal Trade Commission in No. 435 (N. R. 204–210) and in No. 436 (A. R. 68–87), and the dissenting opinions of Commissioners Gwynne and Mason in No. 436 (A. R. 87–108), are not yet reported.

JURISDICTION

The judgment of the Court of Appeals in No. 435 was entered on June 6, 1957 (N. R. 216). The time for filing a petition for writ of certiorari was extended by Mr. Justice Brennan on August 23, 1957, to September 6, 1957 (N. R. 225). The judgment of the Court of Appeals in No. 436 was entered on April 9, 1957 (A. R. 117–118). The time for filing a petition for certiorari was extended by Mr. Justice Black on June 27, 1957, to September 6, 1957 (A. R. 118). The petitions for writs of certiorari were filed on September 6, 1957, and were granted on November 12, 1957. 355 U. S. 867. The jurisdiction of this Court arises under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) authorizes the Federal Trade Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. The question presented is whether the McCarran-Ferguson Act (15 U. S. C. 1011–1015) is to be construed as divesting the Commission of jurisdiction over false and misleading advertising in connec-

tion with the interstate sale of insurance upon the mere enactment of state laws prohibiting such practices within the boundaries of the states involved.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45, provides in part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 70 Stat. 908, 15 U. S. C. 1011–1015 (herein referred to as the McCarran-Ferguson Act), provides:[2]

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[2] The only changes effected by the amendments were the substitution in Sections 2 (b) and 3 (a) of the words "June 30, 1948" for the words "January 1, 1948," and the addition in Section 5 of the word "Guam."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robin-

son-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 5. As used in this Act, the Term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam and the District of Columbia.

STATEMENT

The complaints issued by the Commission against the two respondents, the National Casualty Company and The American Hospital and Life Insurance Company, charged that the companies had, in the course of their interstate business of selling accident and health insurance, falsely advertised their insurance policies and thereby violated the Federal Trade Commission Act (N. R. 2–9, 14–15; A. R. 5–10). Each respondent filed an answer in which it admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading and denied that it had violated the Federal Trade Commission Act

(N. R. 11–14; A. R. 12–22). Each respondent affirmatively alleged in its answer that under the McCarran-Ferguson Act the Commission was without jurisdiction over the respondent's interstate insurance business because of the enactment of state statutes prohibiting unfair or deceptive acts or practices within the states involved (N. R. 11–12; A. R. 12–13).

NO. 435

The facts. National is a Michigan corporation with its principal place of business in that state (N. R. 188). It is engaged in selling health, accident, and all types of casualty insurance and is licensed to sell such insurance in all states, the District of Columbia, and Hawaii. The challenged representations relate only to its accident and health insurance business, from which it received premiums of more than $15,000,000 in 1953 and more than $16,000,000 in 1954 (N. R. 188).

National sells its insurance policies through the solicitation of from 350 to 400 direct but independent insurance agents throughout the nation (N. R. 188). National prepares and sends interstate to these agents direct mailing cards, stuffers, one-page lead sheets, form letters, applications with tear sheets, and throwaways. Most of this material is shipped by mail to the agents in bulk (N. R. 188). The agents disseminate the material locally either by mail or personal distribution (N. R. 189). Something less than 5% of National's advertising material, however, is disseminated by mail directly from National's offices in

Detroit to the public on behalf of its agents (N. R. 188).

Eighty per cent or more of National's accident and health policies are issued by it from its home office after receipt, checking, and consideration by it of the prospect's signed application previously secured by the agent. Policies issued are forwarded to the agent for delivery to the insured. A limited number of agents may issue policies directly, but National has the right to reject such policies after consideration of the application and policy which have been forwarded to it by the issuing agent (N. R. 189).

The examiner's decision. The examiner grouped the challenged representations into five categories: (1) misrepresentations as to the continuation of the policies after purchase;[3] (2) misrepresentations as to the

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[3] Under this category, the examiner found that National represented the following: "No increase in premium because of age. * * * No decrease in benefits because of age. * * * Lifetime accident benefits. * * * For employed men and women ages 16 to 69 years inclusive. * * * Life indemnity accident coverage. * * * For individuals or family groups—ages 1 day to 69 years. * * * Security plan with lifetime benefits. * * * I understand this peace of mind and security will be mine from the first day—even for life. * * * We have removed all age termination limits from the policy" (N. R. 190).

The examiner found that National's policies "all provide that they may be terminated" by National at its option at the end of any premium period, and that two of its policies provide that they "may be cancelled at any time" by National. The examiner held that the representations are deceptive and misleading in that "these statements can reasonably be expected to give a substantial number of readers the definite impression that the policy will continue in effect so long as premiums are paid at least until age 69, or even for life, with full indemnification" (N. R. 191).

required physical condition of the insured;[4] (3) misrepresentations as to the extent of coverage;[5] (4) misrepresentations as to the dollar amounts payable

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[4] With respect to this category, National advertised the following: "No medical examination required." The examiner found that National's policies all provide that no benefits will be paid for loss resulting from sickness, the cause of which is traceable to a condition existing prior to or within a certain number of days (usually 15 or 30) after the effective date of the policy, and that National shall have the right and opportunity "to examine the person of the insured when and as often as it may reasonably require" during the pendency of any claim under the policy. National's accident policies require that "the loss shall result directly and independently of all other causes," to show which the insured may have to submit to medical examination. The examiner held that the representation that no medical examination is required carries the definite impression that National "insures without regard to the prospect's physical condition either before or after issuance of the policy," and that since this is not the fact the representation is misleading and deceptive (N. R. 191–192).

[5] Under this category, National advertised as follows: "The most complete and broadest coverage at the lowest rates. * * * Monthly benefits up to $300 per month paid from first day of sickness or accident plus $300 per month for hospitalization. * * * Hospital room and board for 100 days for each sickness or accident. Your choice of plans paying from $5 to $12.50 per day. Pays full benefit if your hospital room costs less. * * * Guaranteed monthly income for sickness. * * * Guaranteed monthly income for accidents. * * * When I am sick $600 a month as long as three months. * * * New Modern all-inclusive hospital surgical nurse protection. * * * Occupational and non-occupational accidents fully covered. * * * Full coverage on or off the job. * * * Full coverage for female diseases. * * * You should be fully protected against these expenses" (N. R. 192).

The examiner found that National's policies "contain exclusions and limitations which belie 'most complete' or 'broadest coverage' 'fully protected', 'first day of sickness', etc." (N. R. 192–193). The examiner held that the discrepancies in this re-

for operations;[6] (5) misrepresentations as to the time periods for which monthly benefits would be paid.[7] The examiner found that National's policies were deceptively advertised as charged except for category number four.

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spect between the promises of the advertising and the provisions of the policy "may well be reasonably expected to give a prospect an impression of wider and fuller coverage than he gets," and that the advertising representations are "deceptive and misleading" (N. R. 193).

[6] Under this category, National advertised as follows: "Surgical Operations, whether performed in or out of the hospital, are paid up to $300, IN ADDITION TO HOSPITAL BENEFITS. Full benefits are paid to all insured members of the family group. * * * SURGERY BILLS from $5 to $300 for sickness or accident. * * * Pays surgical operation expenses up to $300. * * * Surgical plan—to $300. * * * Three choices of surgical operation benefits $5 to $150, $7.50 to $225, $10 to $300. * * * Your Doctor Bills Paid AT HOME, AT HOSPITAL, AT YOUR DOCTOR'S OFFICE. * * * $10 to $300 Available Surgical Operation Fees. * * * Pays surgical operation fees up to $150. * * * Who pays These Bills? YOU SHOULD BE FULLY PROTECTED AGAINST ALL THESE EXPENSES. * * * NEVER BEFORE HAS SUCH PROTECTION BEEN OFFERED" (N. R. 193–194, 208–209).

The examiner held (N. R. 194) that these representations are not false or misleading. The Commission reversed on this issue (N. R. 209–210), stating in part: "Through such statements, respondent has represented, among other things, that the policies to which they refer provide indemnity up to a maximum sum of $300 for any operation serious enough to cost such an amount. Respondent's policies do not so provide" (N. R. 211).

[7] Under this category, the examiner found that National's "representations reasonably give the impression of indemnification in a specific amount for a definite period of time. 'From the first day for two years,' 'From the first day as long as totally disabled—even for life,' 'Accident income $—— per

With respect to the jurisdictional issue, the examiner held that the Commission had jurisdiction to proscribe deceptive and misleading representations made by National and disseminated directly by mail to prospective purchasers in the several states. He further held that the Commission had jurisdiction to stop National from transmitting such deceptive and misleading representations to its agents for local dissemination in the states of Mississippi, Rhode Island, Missouri, Montana, and the District of Columbia. However, on the basis of the McCarran-Ferguson Act, the examiner concluded that the Commission had no jurisdiction over similar acts and practices of National in the other states, each of which had enacted legislation prohibiting the use in the state of

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month,' etc., reasonably convey that impression" (N. R. 195–196).

He further found as follows: "Respondent's policies themselves, however, confer the indemnity promised only if the insured is wholly and continuously disabled by sickness and prevented thereby from performing any and every occupation or employment plus being under the personal attendance of a doctor. Obviously, there is much illness and disability which does not meet these requirements, especially during convalescence. Some of respondent's policies require continuous confinement to the house, before respondent will pay. Other exclusions are any indemnity for more than one month where loss is due to tuberculosis, hernia, paralysis, or mental derangement; no sickness which began before thirty days after policy issuance; disability arising more than 5, 20, or 30 days after the accident; maternity benefits only after policy has been in effect 10 months—in other words, respondent gets 10 months' premiums before it has to pay for loss of time for maternity" (N. R. 196).

unfair or deceptive acts or practices in the business of insurance (N. R. 201–202).[8]

The Commission decision. The Commission held that all the advertising representations set forth in the complaint were unfair and deceptive as charged (N. R. 208–210, 211). It further held, on the basis of its opinion in *American Hospital* (*infra*, pp. 16–19), that it had jurisdiction over the unfair and deceptive advertising practices of National in interstate commerce and that the mere enactment of state laws relating to such practices did not operate to divest it of jurisdiction (N. R. 205). The Commission accordingly entered an order requiring National, "in connection with the offering for sale, sale and distribution" in interstate commerce of accident and health insurance policies, to cease and desist from advertising the policies in the manner found by the Commission to be unfair and deceptive (N. R. 210–213). Two Commissioners dissented (N. R. 210, 213).

NO. 436

The facts. American is a Texas corporation with its principal place of business in that state. It is engaged in selling life, health, and accident insurance

[8] The examiner found that some 36 states had enacted the so-called "Model Bill" relating to insurance. And he found that, in addition to these 36 states, 8 others had statutes which, "while couched in different language or varying somewhat in detail, are essentially the same in effect as the 'Model Bill.' Of the remaining five [jurisdictions], one—Mississippi—has no 'regulation' of the insurance business at all, and remaining four have only statutes which patently refer only to life insurance companies, which this respondent is not" (N. R. 199–200).

and is licensed to sell such insurance in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. The challenged representations related only to its accident and health insurance business, from which it received premiums of $4,835,523.05 in 1953 and $5,009,184.47 in 1954 (A. R. 61–62).

American sells its accident and health insurance policies through agents in the various states where it is licensed to do business. For the purpose of selling insurance, American prepares and sends circulars or brochures, which contain the challenged representations, from Texas to its agents. These circulars or brochures are used by the agents and shown by them to prospective purchasers as aids in selling the policies to which they refer. Upon completion of an application for insurance, the advertising portions of the circular or brochure are left with the purchaser (A. R. 62–63).

When an agent in a state other than Texas secures an application for a policy, the agent sends the application through the mail with the premium payment to American in Texas. Upon acceptance of the application, the policy is issued and mailed by American to the agent in the other state for delivery to the purchaser (A. R. 62).[9]

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[9] In the substantial number of cases where purchasers of policies have moved from states where American is licensed to do business into states where it is not so licensed, American's practice is to mail premium notices and receipts to and to receive premium payments from the policyholder. Premium payments so received amounted to more than $47,300 in 1953 and more than $78,400 in 1954 (A. R. 62).

The examiner's decision. On the basis of the McCarran-Ferguson Act, the examiner concluded that the Commission had no jurisdiction with respect to allegedly false and deceptive acts and practices in commerce carried on by American except with persons living in Mississippi, the only state involved which at that time had not enacted legislation relating to deceptive insurance advertising (A. R. 37).[10] He further held that the charges of the complaint as to the false and misleading nature of the advertising had not been established (A. R. 37–58).

The Commission decision. The examiner's decision was reversed by the Commission, which held that all but one category of the advertising representations set forth in the complaint were unfair and deceptive as charged (A. R. 60–67).[11] The Commission found, as charged in the complaint (A. R. 5–10), that the cir-

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[10] He found that ten of the states in which respondent does business (Arizona, Arkansas, Colorado, Indiana, Kansas, Kentucky, Louisiana, New Mexico, Oklahoma, and Tennessee) had enacted statutes identical, or substantially identical, with the so-called "Model Unfair Trade Practices Bill for Insurance," which prohibits unfair methods of competition and unfair and deceptive acts and practices in the insurance business; that two of the other states in which respondent does business, Missouri and Illinois, had comparable statutes; that Mississippi did not; and that the statutes of Texas were immaterial since respondent's business within that state was intrastate (A. R. 33–37).

In the period between the examiner's decision and the Commission's decision, Mississippi enacted a regulatory statute (A. R. 107).

[11] The Commission dismissed the charge of the complaint that American had misrepresented that its policies might be continued indefinitely at the option of the insured (A. R. 63).

culars or brochures furnished by American and used by its agents in selling insurance contained misrepresentations as to the extent of coverage of the policies in the event of illness;[12] misrepresentations as to the extent of coverage of the policies in the event of accident;[13] misrepresentations as to the amounts that

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[12] Under this category, the Commission found that American advertised the following: "Confining: Illness: Indemnity: $—— Per Month. for loss of time from illness, beginning on the fourth day and continuing for one year for each illness (Up to two months full benefits for non-confining illness)" (A. R. 64, 82).

The Commission found that through this and similar statements American represents directly and by implication "that its policies provide indemnification for loss of time due to any and all sickness or illness." The Commission found that under some of American's policies indemnification is "expressly restricted" to sickness or disease "which wholly, necessarily and continuously disables and prevents the insured from engaging in any business, profession or employment for wage or profit and only for such period of time as the policyholder is regularly visited and attended by a legally qualified physician (M. D.), surgeon (M. D.) or osetopath * * *." The Commission also found that American's policies do not cover "illness due to pregnancy, miscarriage or childbirth in case of a woman policyholder * * *." The Commission held, therefore, that American's representations as to the indemnification provided by its policies for loss of time due to sickness or illness are "false and deceptive" (A. R. 64; see also A. R. 82–86).

[13] Under this category, the Commission found that American advertised the following: "Total Accident Disability: $—— Per Month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled," and "Partial Accident Disability: $—— Per Month for loss of time from accidental injury, beginning with the first day and continuing for the period of partial disability (limit 3 months)" (A. R. 64–65, 83).

The Commission found that through these and similar statements American represents directly and by implication "that

would be paid for surgical operations;[14] and misrepresentations that maternity benefits would be paid in addition to the other benefits payable under the poli-

its policies provide indemnification for loss of time due to all or any accidents." The Commission found that under some of American's policies its liability due to total accident disability "is limited to accidents that shall within twenty days after the date of the accident wholly, necessarily and continuously disable and prevent the insured from performing each and every duty pertaining to his occupation for the first twelve months," and that after the first twelve months, in order to collect, the insured must be "wholly and continuously disabled" from engaging in any occupation for wage or profit. The Commission found that the policies expressly limit American's liability for loss of time due either to total or partial accident disability to such periods as the insured is under the regular care of a physician, surgeon or osteopath. The Commission held, therefore, that American's representations in this respect are "false and deceptive" (A. R. 65; see also 83–86).

[14] Under this category, the Commission found that American advertised one of its policies as follows: "Surgery from $3.00 to $150.00 * * * depending on seriousness of operation" (A. R. 66, 86).

The Commission found that through such statements American represents that the policy "provides indemnity up to a maximum sum of $150 for any operation serious enough to cost such an amount * * *," and that the policy does not so provide. Under the policy, the Commission found, payment "is in accordance with a schedule of fixed fees for different types of operations." Only six out of 67 operations listed allow for a surgeon's fee of $150, and 29 operations allow for surgeon's fees of $25 or less, "regardless of the actual cost of such operations to the policyholder." The Commission held that American's representations in this respect are "false and deceptive" (A. R. 66; see also A. R. 86).

cies.[15] The Commission further held that it had jurisdiction over the unfair and deceptive advertising practices of American in interstate commerce, irrespective of whether the states involved had adopted local laws relating to such practices (A. R. 68–82), and entered an order prohibiting further use of the practices found to be unlawful (A. R. 67–68).

On the question of its jurisdiction, the Commission recognized that the McCarran-Ferguson Act was enacted for the purpose of allowing the states to continue to regulate the business of insurance, thus dispelling doubts raised by *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. But the Commission did not read the Act, especially in the light of the circumstances that led to its passage, as a complete abdication of all federal regulation of the interstate aspects of the business of insurance (A. R. 69–73). Such activities, the Commission held, could not be "regulated by State law" and hence remained subject to its jurisdiction by virtue of the McCarran-

[15] Under this category, the Commission found that, following a listing of the benefits payable under one of American's policies for room service, hospital expense, and surgery, American advertised the following: "Additional Benefits * * * Maternity: Up to $—— after * * * insurance has been in force 10 months * * *" (A. R. 65–66, 86–87).

The Commission found that the policy expressly provides that payment of maternity benefits shall be "in lieu of all other benefits provided in the policy for hospital services." The Commission held that "it is, thus, clear that the maternity benefit, instead of being an additional benefit, as represented is merely a substitute," and that American's representations to the contrary are "false and deceptive" (A. R. 66; see also A. R. 86–87).

Ferguson Act proviso "[t]hat after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law" (A. R. 74).

In the Commission's view (A. R. 79), there is "an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation 'to the extent that such business is not regulated by State law' is inoperative." Though state regulation is authorized by the McCarran-Ferguson Act and may "hav[e] consequences in other jurisdictions" (A. R. 79), the Act, the Commission held, was not intended to create a "legal vacuum" and thus enable insurance companies to escape adequate regulation where there is no conflict between state and federal laws (A. R. 75).

Implicit in the view of the hearing examiner, the Commission stated (A. R. 70–71), "is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. * * * We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation, admits of such a construction. * * *"

The Commission further stated (A. R. 75, 76, 80):

> The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only

consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the State in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

* * * * *

* * * Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

* * * * *

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress decep-

> tion in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. * * *

The Commission thus concluded that the mere enactment of a state law relating to advertising practices of insurance companies did not operate to oust it of jurisdiction.

THE DECISIONS OF THE COURTS OF APPEALS

On American's petition to review, the Fifth Circuit set aside the Commission's order. It held that the Commission under the McCarran-Ferguson Act was without jurisdiction because of the enactment of state laws forbidding the use of unfair and deceptive acts and practices in the states where American transacts business (A. R. 110–117). The court stated that it had no doubt that a state has the power "adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries" (A. R. 116).

Similarly, on National's petition to review, the Sixth Circuit set aside the Commission's order and remanded the case to the Commission for further proceedings consistent with its opinion (N. R. 216–225). In rejecting the Commission's conclusion on the jurisdictional issue, the court recognized "some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, out-

side the jurisdiction of the states, which should be subject to federal regulation" (N. R. 222). The court, however, denied "that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be" (N. R. 222). The court held that the Commission was without jurisdiction in those states which had enacted legislation relating to insurance advertising (N. R. 225).

SUMMARY OF ARGUMENT

The two courts below held that Congress by the McCarran-Ferguson Act conferred upon the states the power, by the mere enactment of state laws seeking the accomplishment of the exact purpose of the Federal Trade Commission Act, to divest the Commission of jurisdiction over the interstate sale of insurance by false and misleading advertising. We think these decisions misconstrue the McCarran-Ferguson Act.

In *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, this Court held that the business of insurance conducted across state lines is interstate commerce and is subject to the prohibitions of the Sherman Act. Prior to that decision, many states had considered rate-fixing on insurance to be in the public interest, and had enacted regulatory laws authorizing and supervising the fixing of such rates. Also, many states had laws imposing taxes on out-of-state insurance companies in a manner which may have burdened or discriminated against interstate commerce in insurance.

In a successful effort to offset the effect of the *South-Eastern Underwriters* decision, Congress

enacted the McCarran-Ferguson Act, declaring in Section 1 "that the continued regulation and taxation by the several States of the business of insurance is in the public interest * * *." To give the insurance companies a breathing spell and the states an opportunity to declare their own policies as to the regulation of insurance, Congress provided in Section 3 (a) of the Act a three-year moratorium on the application to that business of the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act. But Congress also specified, in Section 2 (b) of the McCarran-Ferguson Act, that, after the expiration of the moratorium the Sherman, Clayton, and Federal Trade Commission Acts *"shall be applicable to the business of insurance to the extent that such business is not regulated by State law"* (emphasis added). It is the latter provision which is principally in issue here.

Under the construction of this provision by the courts below, the Federal Trade Commission is denied effective jurisdiction to prevent the use of false and misleading advertising in connection with the interstate sale of insurance. The holdings would limit the Commission's jurisdiction, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising. According to these decisions, Commission jurisdiction is automatically extinguished upon the mere enactment of such legislation—extinguished without regard to the fact that the transactions may, as a practical matter, be beyond the scope of effective state regulation; without regard to the fact that false advertising

is condemned by the state legislation, not sanctioned by it; and without regard to the fact that the federal action would not conflict with state action in any way. A more discriminating approach, we believe, is required by the language and history of the Act.

A

At the outset, it is of fundamental importance to understand how relatively narrow is the question presented. The Commission, it should be emphasized, is not attempting to apply a federal statute which conflicts with state legislation. There is no contention here that a federal statute supersedes or invalidates state legislation in any way. Nor is the Commission proceeding against insurance advertising which has been approved, formally or informally, by state authorities. Nor are we concerned here with local or intrastate transactions. Instead, all that the Commission contends is that Congress has not divested it of authority under the Federal Trade Commission Act to police the channels of interstate commerce, in conjunction and cooperation with the states, in order to provide full protection to the public from deception in this important area.

Indeed, not only is there no conflict, but actually the standards of the Federal Trade Commission Act and the state statutes are identical. Each prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." And no one has even intimated that any of the states actually had applied its regulatory statute to the advertising practices of the two companies involved here.

Thus, the issue before the Court is not whether the Federal Trade Commission Act can be applied so as to override state policy specifically expressed either in statutes or administrative action. Congress, we think, has resolved that issue in the negative. The issue here is quite different—namely, whether the Federal Trade Commission Act can be applied to false interstate insurance advertising in the absence of such a conflict. Compare *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (especially concurring opinion of Mr. Justice Frankfurter at pp. 300–302), involving the scope of federal authority over liquor under the Twenty-First Amendment.

B

As this Court noted in *South-Eastern Underwriters* (322 U. S. at 552): "The power granted Congress [by the Commerce Clause] * * * is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—*to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing*" (emphasis added). This inherent incapacity of "the individual states, with their limited territorial jurisdictions," was left unchanged by the McCarran-Ferguson Act, which indisputably did not add to the jurisdiction possessed by the states prior to the *South-Eastern Underwriters* decision. The result, in the absence of federal regulation to fill the void, is a legal vacuum—a "no man's land" which is not effectively regulated either by the states or by the federal government.

To conclude that Congress intended such a divestiture of federal jurisdiction would require, we believe, far more explicit language than is contained in the proviso to Section 2 (b). Particularly is this so in view of the express purpose of the drafters "to secure adequate regulation and control" of the insurance business. S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2. This purpose obviously cannot be reconciled with the existence of the "no man's land" which the Sixth Circuit apparently concedes would result from its construction of the Act.

At the very least, therefore, we think that the Act, in providing that the Federal Trade Commission Act shall apply "to the extent that such business is not regulated by State law," must be taken to mean that the Federal Trade Commission Act shall apply to the extent that the business, in its interstate aspects, cannot be effectively regulated by state law. Stated otherwise, to the extent that the business cannot be effectively regulated by state law, then surely to that extent the "business is not regulated by State law." To hold that the mere placing on the statute books of a state enactment forbidding "unfair methods of competition" and "unfair or deceptive acts or practices" completely ousts the Commission of jurisdiction, even though the state statute is little more than hortatory in its effect on the interstate aspects of the dissemination of false insurance advertising, would be to impute to Congress a willingness to be satisfied by state "regulation" which exists only on paper.

C

The basic distinction is between (1) state insurance laws sanctioning what federal law forbids and (2) state insurance laws prohibiting what federal law also forbids. We believe that the courts below, in holding that the mere enactment of state insurance laws relating to false advertising precludes Commission jurisdiction, erred in failing to draw this distinction.

The mere enactment of specific state insurance laws in the first category may be sufficient to render certain federal laws inapplicable; for, in that event, there is an obvious collision between federal and state policy and Congress has decreed that state policy should be controlling. But as to the second category, there is no such conflict. Until the state authorities act to apply this common policy to the same transaction, there would seem to be no substantial reason why the federal and state governments should not both have jurisdiction.

To hold that the mere enactment of state laws in the second of the two categories ousts the Commission of jurisdiction is to distort and defeat the purpose of the McCarran-Ferguson Act. As this Court recognized in *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, 429–430, the purpose of the Act "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation"

and by affirmatively declaring the business of insurance to be subject to state regulation and taxation. This purpose is completely consistent with, and effectuated by, the Commission's action in undertaking to stop false and misleading advertising in the interstate sale of insurance. Such action does not in any way interfere with the execution of state insurance policies, but instead serves to supplement the limited power of the states in carrying out those policies.

In providing that the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law," Congress was dealing, we think, with matters of substance and not form, and was referring to "regulation" in fact—*i. e.*, state action which actually takes hold of the conduct involved. Where, for example, a state law authorizes the maintenance of rate-fixing bureaus and no implementing administrative action is needed, the transaction is "regulated by State law" in a very concrete sense; the statute is self-executing and the regulatory action is implicit in the statute itself. But where a statute, instead of sanctioning a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no "regulation" in fact.

This is especially true where the prohibitory legislation is as general in scope as the state statutes involved here. Unless and until the administrative

process of "filling in and administering the details embodied by [the] general standard" (*Humphrey's Executor* v. *United States*, 295 U. S. 602, 628) is consummated in individual cases, to that extent the "business is not regulated by State law."

D

Apart from stating the purpose "to secure adequate regulation and control of the insurance business", the House and Senate reports on the bill contain nothing dealing directly with the question presented here. As already shown, "adequate regulation" cannot be accomplished under the construction adopted by the courts below, which, even though there is no conflict between the purpose of state laws and that of the Federal Trade Commission Act, leaves the advertising practices of insurance companies beyond the scope of effective regulation where such companies operate on a nation-wide or multi-state basis.

The floor debates on the McCarran-Ferguson bill also furnish substantial support for the Commission's construction of the Act. Senator McCarran's statements are fully consistent with the Government's position. Senator Ferguson, a co-sponsor of the Act, indicated that it was only in cases of conflict that state enactments would serve to divest the Commission of interstate jurisdiction over the business of insurance; indeed, Senator Ferguson even disclaimed any intention to let the states regulate interstate commerce at all. Senator O'Mahoney, one of the Senate

managers of the bill and as such a co-author of the proviso to Section 2 (b), assured the Senate that, after the expiration of the moratorium, the Federal Trade Commission Act would again become fully applicable to the business of insurance. And members of the House expressed their desire that the application of the Federal Trade Commission Act to false advertising by insurance companies be preserved.

ARGUMENT

THE McCARRAN-FERGUSON ACT DOES NOT DIVEST THE COMMISSION OF JURISDICTION OVER FALSE AND MISLEADING ADVERTISING IN CONNECTION WITH THE INTERSTATE SALE OF INSURANCE UPON THE MERE ENACTMENT OF STATE LAWS PROHIBITING SUCH PRACTICES WITHIN THE BOUNDARIES OF THE STATES INVOLVED

These cases are concerned with the business of insurance—a business viewed by this Court as "one of the largest and most important branches of commerce," one which "touches the home, the family, and the occupation or business of almost every person in the United States." *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, 540.

More specifically, the cases involve advertising practices in connection with sales of accident and health insurance in interstate commerce.[16] Total acci-

[16] "Accident and health" insurance, sometimes called "accident and sickness" insurance, is a disability coverage providing indemnification against loss resulting from accidental injury or sickness. This indemnification is in the form of benefits payable for hospitalization, medical and surgical expenses, and loss of income during periods of disability.

dent and health premium payments in the United States during the year 1956 amounted to more than 4.96 billion dollars.[17] The spectacular increase in sales of this type of insurance in recent years probably finds no parallel in our economy. An industry publication[18] recently stated that between 1940 and the end of 1956 the number of persons in this country with hospital expense protection increased from 12,312,000 to 115,949,000 (an increase of more than 840%); the number with surgical expense protection increased during the period from 5,350,000 to 101,325,000 (an increase of more than 1,790%); and the number with regular medical expense protection increased during the period from 3,000,000 to 64,891,000 (an increase of more than 2,000%). Thus, of an estimated 170,000,000 population of the United States at the end of 1956, more than 68% carried hospital insurance, more than 59% carried surgical insurance, and more than 38% carried medical insurance.

Taking note of widespread evidence that the phenomenal growth of the accident and health insurance business has been accompanied in many instances by false and misleading advertising, and cognizant of the important public interest in protecting the people

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[17] *The National Underwriter*, No. 18, p. 1 (May 3, 1957).

[18] *The Extent of Voluntary Health Insurance Coverage in the United States as of December 31, 1956*, published by The Health Insurance Council (Aug. 1957), p. 10. The Health Insurance Council is composed of eight associations representing insurance companies selling accident and health insurance. The companies represented sell more than 90% of this type of insurance sold by United States insurance companies. (Inside front cover of publication.)

of the United States from advertising of this nature, the Commission has undertaken an active program under Section 5 of the Federal Trade Commission Act to eliminate such practices from the channels of interstate commerce. In all, the Commission since October 1954 has issued 41 complaints in this field. In 13 of the cases, the Commission has issued orders to cease and desist; one of the complaints was dismissed for failure of proof of the false advertising practices charged; hearing examiners have issued initial decisions containing orders in 15 cases which have not yet been acted upon by the Commission; hearing examiners have issued initial decisions containing orders dismissing the Commission's complaint in four cases which have not yet been acted upon by the Commission; and eight of the cases have not yet been acted upon by examiners. These 41 cases comprise virtually every possible method of advertising and selling accident and health insurance in interstate commerce, including the local agent method, the use of the United States mails, and the use of radio, television, newspapers, and other periodicals.[19]

[19] In addition to the two instant cases, four other Commission cease and desist orders against accident and health insurance companies are pending for review in Courts of Appeals: *Travelers Health Association* v. *Federal Trade Commission* (Commission Docket No. 6252; C. A. 8, No. 15,743), argued orally on November 13, 1957; *American Life and Accident Insurance Company* v. *Federal Trade Commission* (Commission Docket No. 6238; C. A. 8, No. 15,828), scheduled for oral argument on March 5, 1958; *Automobile Owners Safety Insurance Company* v. *Federal Trade Commission* (Commission Docket No. 6239; C. A. 8, No. 15,830), scheduled for oral argument on March 5, 1958; *North American Accident Insurance Company*

However, under the decisions of the courts below, the Commission is denied effective jurisdiction in this field. The effect of these decisions is to limit the Commission's jurisdiction, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising. According to the two decisions, Commission jurisdiction is automatically extinguished upon the mere enactment of such legislation—extinguished without regard to the fact that the transactions may, as a practical matter, be beyond the scope of effective state regulation; without regard to the fact that false advertising is condemned by the state regulation, not sanctioned by

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v. *Federal Trade Commission* (Commission Docket No. 6456; C. A. 5, No. 16633), time for filing record extended until disposition by this Court of the instant cases. The Commission's decisions in these cases have not yet been officially reported. The Commission found that the methods of transacting business of the four companies are as follows: Travelers Health Association does a mail-order insurance business in all states, is licensed only in Nebraska (its home state) and Virginia, employs no local agents, and advertises its policies only by direct mail from Nebraska to prospects for insurance. American Life and Accident Insurance Company transacts a mail-order insurance business in all states, is licensed only in Missouri (its home state), employs no local agents and advertises its policies by radio from Missouri, Illinois, and Kansas and by direct mail from Missouri to prospects. Automobile Owners Safety Insurance Company transacts a mail-order insurance business in all states except Virginia, is licensed only in Missouri (its home state), and advertises its policies only by direct mail from Illinois to prospects. North American Accident Insurance Company transacts business in all states, is licensed and employs local agents in all states, and advertises its policies by radio, newspapers, and other periodicals, and by direct mail from Illinois (its home state) to prospects.

it; and without regard to the fact that the federal action would not conflict with state action in any way.

These holdings, we submit, misinterpret the scope of the McCarran-Ferguson Act on which they rely. The McCarran-Ferguson Act resulted from this Court's 1944 decision in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, that the business of insurance conducted across state lines is interstate commerce and that the prohibitions of the Sherman Act apply to that business. Prior to that decision, the Court had held that the business of insurance was not commerce, either intrastate or interstate.[20] The states, as the opinions in *South-Eastern Underwriters* recognized, had built up separate systems of laws specifically dealing with the business of insurance conducted within their boundaries. The constitutionality of this entire structure under the Commerce Clause was placed in doubt by the *South-Eastern Underwriters* decision. The industry feared the invalidation of state laws authorizing certain anticompetitive practices such as the maintenance of rating bureaus and, indeed, feared the possibility of total federal regulation. The states, on their part, feared the loss of large revenues through the invalidation of their insurance tax laws. To dispel these fears, and "to secure adequate regulation and control of the insurance business" (S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p.

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[20] *E. g.*, *Paul* v. *Virginia*, 8 Wall. 168, 183; *Hooper* v. *California*, 155 U. S. 648, 654–655; *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 503–504, 510.

2), the McCarran-Ferguson Act was enacted. See *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408.

The Act provides in Section 1 "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Section 2 (a) provides that "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Section 2 (b) is as follows:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided, That after June 30, 1948, * * * the Sherman Act, * * * the Clayton Act, and * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.* [Emphasis added.]

Section 3 (a) established a moratorium until June 30, 1948, as to the application of the three acts named in Section 2 (b) to the business of insurance. Section 3 (b) provides that nothing in the Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate or to any act of

boycott, coercion, or intimidation.[21] And Section 4 provides that the Act shall not be construed to affect in any manner the application to the business of insurance of the National Labor Relations Act, the Fair Labor Standards Act, and the 1920 Merchant Marine Act.[22]

The critical language here is the italicized proviso (*supra*) to Section 2 (b), which affirmatively continues Commission jurisdiction "to the extent that such business is not regulated by State law." Under the circumstances of these cases, the Commission held that this proviso did not operate to divest the Commission of jurisdiction under the Federal Trade Commission Act to prevent the interstate sale of insurance by means of false advertising—in short, that such practices by National and American are "not regulated by State law" merely because of the enactment of general state legislation on the subject.

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[21] In *United States v. New Orleans Insurance Exchange*, 148 F. Supp. 915, 922 (E. D. La.), affirmed *per curiam* 355 U. S. 22, the District Court said that "The legislative history of Section 3 (b) [of the McCarran-Ferguson Act] affirms what its language so plainly says," and held that the Sherman Act was applicable to a group boycott by an association of insurance agencies and its members.

[22] We believe that the Sixth Circuit erred in stating concerning this section (N. R. 222): "If it was intended by the Act to retain in or give to the agencies of the Federal Government jurisdiction over insurance companies engaged in interstate commerce, irrespective of its regulation by state law, this section of the Act [Section 4] was unnecessary and meaningless since the acts referred to would be applicable by reason of the Supreme Court's decision [in the *South-Eastern Underwriters* case] without the provisions of Section 4." But it is clear that if Section 4 had been omitted, the three Acts mentioned therein would have been subject to (and not exempt from) the over-all impact of the McCarran-Ferguson Act.

In urging the correctness of this construction, we shall show, *first,* that no conflict—either statutory or administrative—exists between the Commission's action and any state law; *second,* that a contrary construction would create a regulatory "no-man's land" which Congress could not have intended; *third,* that the purpose of the McCarran-Ferguson Act was to remove federal impediments to the execution of state policies, and not to bar federal action wholly consistent with such state policies; *fourth,* that the legislative history of the McCarran-Ferguson Act confirms this construction.

A. IN THESE CASES, THERE IS NO CONFLICT, EITHER IN THE STATUTES THEMSELVES OR IN THEIR ADMINISTRATION, BETWEEN THE FEDERAL TRADE COMMISSION ACT AND STATE LAWS RELATING TO FALSE AND MISLEADING ADVERTISING OF INSURANCE

At the outset, it is of fundamental importance to understand how relatively narrow is the question presented. The Commission, it should be emphasized, is not attempting to apply a federal statute which conflicts with state legislation. There is no contention here that a federal statute supersedes or invalidates state legislation in any way. Nor is the Commission proceeding against insurance advertising which has been approved, formally or informally, by state authorities. Nor are we concerned here with local or intrastate transactions. Instead, all that the Commission contends is that Congress has not divested it of authority under the Federal Trade Commission Act to police the channels of *interstate* commerce, in conjunction and cooperation with the states, in order to

provide full protection to the public from deception in this important area. Such federal authority serves to fill the jurisdictional void which the Sixth Circuit apparently concedes would exist under its decision (see *infra*, p. 43).

Not only is there no conflict, but indeed the standards of the Federal Trade Commission Act and the state statutes are identical. Each prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."[23] And though a number of states have appeared in the courts below as *amici curiae* urging the inapplicability of the Federal Trade Commission Act in these cases, not one has even intimated that it actually had applied its regulatory statute to the practices of the two companies involved here. Plainly, if the states had the capacity, and had exercised it, to prevent the interstate sale of insurance by means of false advertising, the Commission would have had no occasion to proceed in these cases.[24]

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[23] At the present time, 41 states, Alaska, and Hawaii have enacted the "Model Unfair Trade Practices Bill for Insurance," or a statute substantially similar thereto, prohibiting in the language of the Federal Trade Commission Act "unfair methods of competition" and "unfair or deceptive acts or practices" in the business of insurance generally. The Kansas statute, typical of these state laws, is printed in an appendix, *infra*, pp. 67–80. In addition, California, Idaho, Illinois, Montana, Oregon, Rhode Island, and Puerto Rico have somewhat similar statutes relating to unfair trade practices in the business of insurance generally. The remaining state, Missouri, and the District of Columbia have similar statutes relating only to life insurance companies.

[24] While it was unnecessary to its decision, since there is no conflict here, the Commission's opinion states, *inter alia*, that Congress must have "contemplated that under certain condi-

These cases, in short, are precisely the opposite of a case such as *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange,* 181 F. 2d 174 (C. A. 8), certiorari denied, 340 U. S. 823. In that case, involving a treble damage suit alleging violations of the Sherman Act, an Arkansas statute authorized the fixing through rating bureaus of rates on casualty insurance sold within the state. The court held (*id.* at 176) that, although the activities of the rating bureaus may have been in violation of the Sherman Act prior to the enactment of the McCarran-Ferguson Act, the latter act was designed "to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce." Therefore, since the Arkansas statute specifically sanctioned the very practice in question and hence conflicted with the prohibitions of the Sherman Act, the federal act did not apply.[25]

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tions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof" (A. R. 75). The Commission has never so applied the Act and the quoted statement, we believe, amounts only to *obiter dicta.*

Indeed, under the Commission's construction of the McCarran-Ferguson Act, it is most unlikely that a conflict would ever arise as to insurance advertising. Surely it is inconceivable that any state would enact a statute affirmatively sanctioning false advertising. Nor does a conflict seem possible in the administration of the state laws prohibiting false insurance advertising. See note 32, *infra.*

[25] Cf. *Miley* v. *John Hancock Mutual Life Insurance Company,* 148 F. Supp. 299 (D. Mass.), affirmed *per curiam,* 242 F. 2d 758 (C. A. 1), certiorari denied, 355 U. S. 828. That case involved a suit for treble damages because of an alleged

But here the state statutes and the federal act are entirely consistent and complementary. False advertising of insurance is opposed to the public interest, as the Congress and the states have both declared. And the power of Congress to remove Commerce Clause restrictions upon state legislation, and to join with the states in effecting a common policy and purpose, frequently has been upheld by this Court.[24] These decisions uniformly "have sustained coordinated action taken by Congress and the states in the regulation of commerce." *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. at 433. In the latter case, dealing with another aspect of the McCarran-Ferguson Act, the Court pointed out (*id.* at 439) that federal and state agencies "were not forbidden to cooperate or by doing so to achieve legislative consequences, particu-

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conspiracy in restraint of trade under the Sherman Act. The District Court held (148 F. Supp. at 302): "Assuming that what was done here by the defendants would under other circumstances constitute a conspiracy or combination violative of the Sherman Act, it was nevertheless done in the course of negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided [in the proviso to Section 2 (b) of the McCarran-Ferguson Act] that the Sherman Act shall not apply." This is another instance where a state law which conflicted with the Sherman Act was held to control.

[24] *In re Rahrer*, 140 U. S. 545, 559–565; *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311, 320–325; *Whitfield* v. *Ohio*, 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769; *International Shoe Co.* v. *Washington*, 326 U. S. 310, 315; *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 433, and cases cited in n. 43 at 433.

larly in the great fields of regulating commerce and taxation; which, to some extent at least, neither could accomplish in isolated exertion."

Thus, the issue before the Court is not whether the Federal Trade Commission Act can be applied so as to override state policy specifically expressed either in statutes or administrative action. Congress, we think, has resolved that issue in the negative. The issue here is quite different—namely, whether the Federal Trade Commission Act can be applied to false interstate insurance advertising in the absence of such a conflict.

In this respect, the problem of determining the effect of the McCarran-Ferguson Act on federal authority over insurance is remarkably similar to the problem of determining the effect of the Twenty-first Amendment on federal authority over liquor. This Court has regularly held that "The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquor brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138.[27] But the Twenty-first Amendment has never been construed as an abdication of federal jurisdiction under the Sherman Act to prevent combinations in restraint of interstate trade where there is no conflict with the policy of state law.

In *United States* v. *Frankfort Distilleries, Inc.*, 324

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[27] See also *State Board* v. *Young's Market Co.*, 299 U. S. 59, 62; *Mahoney* v. *Triner Corp.*, 304 U. S. 401, 403–404; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394; *Finch & Co.* v. *McKittrick*, 305 U. S. 395, 398; *Carter* v. *Virginia*, 321 U. S. 131, 137, and see concurring opinions of Mr. Justice Black at 138 and Mr. Justice Frankfurter at 139.

U. S. 293, several producers, wholesalers, and retailers of liquor were indicted for engaging in a conspiracy to fix and maintain retail resale prices in violation of the Sherman Act. The defense was that under Colorado's "Fair Trade" statute vertical agreements to fix minimum resale prices were lawful, and that the Twenty-first Amendment barred the prosecution. In holding that the Sherman Act applied to the conspiracy, the Court emphasized the absence of any conflict between the policy of the Sherman Act and the Colorado statute. The Court stated (*id.* at 299):

> The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either. We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented.

In a concurring opinion, Mr. Justice Frankfurter stated that the Twenty-first Amendment empowered the states to regulate liquor "according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce * * *" (*id.* at 300), and that accordingly, "if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power "(*id.* at

302). But he joined in the Court's decision because of the lack of any "contention that the policy of Colorado sanctions that which it is claimed the Sherman Law forbids" (*ibid.*).

So, here, the McCarran-Ferguson Act empowers the states to regulate insurance "according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce * * *". But here, as in *Frankfort Distilleries,* there is no basis for any "contention that the policy of [a state] sanctions that which it is claimed the [federal law] forbids". As stated in the Court's opinion in *Frankfort Distilleries,* "We therefore do not have here a case in which the [federal law] is applied to defeat the policy of the state".

In these circumstances, as we shall show below, the McCarran-Ferguson Act does not bar application of the Federal Trade Commission Act.

B. THE COMMISSION'S CONSTRUCTION OF THE ACT AVOIDS, WITH RESPECT TO FALSE INSURANCE ADVERTISING IN INTERSTATE COMMERCE, A REGULATORY "NO MAN'S LAND" WHICH CONGRESS COULD NOT HAVE INTENDED

As this Court noted in *South-Eastern Underwriters* (322 U. S. at 552): "The power granted Congress [by the Commerce Clause] * * * is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—*to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.*" (Emphasis added.) See

also *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429–430. This incapacity of "the individual states, with their limited territorial jurisdictions," was left unchanged by the McCarran-Ferguson Act, which indisputably did not add to the jurisdiction possessed by the states prior to the *South-Eastern Underwriters* decision.

"Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in [*South-Eastern Underwriters*] might be found to have on State regulation of insurance." *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413. Thus, the House report accompanying the legislation flatly stated: "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." H. Rep. No. 143, 79th Cong., 1st Sess., p. 3. See also 91 Cong. Rec. 1442 (statement of Senator McCarran).

To the extent, therefore, that "the individual states, with their limited territorial jurisdictions [were] not fully capable of governing" insurance "transactions which, reaching across state boundaries, affect the people of more states than one," that condition necessarily continued after enactment of the McCarran-Ferguson Act. The result, in the absence of federal

regulation to fill the void, is a legal vacuum—a "no man's land" which is not effectively regulated either by the states or by the federal government.

This was recognized by the Sixth Circuit, which acknowledged that "There is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation" (N. R. 222). That court, however, denied "that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be" (N. R. 222). Under the court's construction of the proviso to Section 2 (b), the Commission's jurisdiction in the field is limited, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising.

In so holding, the court treated the proviso to Section 2 (b) as "the only express grant of power to the Federal Trade Commission over the business of insurance contained in the Act" (N. R. 221). But the Commission's jurisdiction over interstate commerce (including the interstate sale of insurance) is derived from its organic statute, the Federal Trade Commission Act. The question, therefore, is not whether the McCarran-Ferguson Act confers on the Commission jurisdiction over the interstate business of insurance, but whether that Act *divests* the Commission of the jurisdiction over the multi-state activities of insurance companies which it would otherwise have by virtue of

the Federal Trade Commission Act and the *South-Eastern Underwriters* decision.

To conclude that Congress intended such a divestiture would require, we believe, far more explicit language than is contained in the proviso to Section 2 (b). This Court has admonished that exceptions to the antitrust laws (including the Federal Trade Commission Act) are to be strictly construed. See, *e. g., United States* v. *McKesson & Robbins,* 351 U. S. 305, 316. But, more important, Congress should not be presumed by its silence to have deliberately established a regulatory "no man's land" with respect to protection of the public from false and misleading insurance advertising. Particularly is this so in view of the express purpose of the drafters "to secure adequate regulation and control" of the insurance business. S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2. This purpose obviously cannot be reconciled with the existence of the "no man's land" which the court below apparently concedes would result from its construction of the Act.

At the very least, therefore, we think that the Act, in providing that the Federal Trade Commission Act shall apply "to the extent that such business is not regulated by State law", must be taken to mean that the Federal Trade Commission Act shall apply to the extent that the business, in its interstate aspects, cannot effectively be regulated by state law. Stated otherwise, to the extent that the business cannot effectively be regulated by state law, then surely to that extent

the "business is not regulated by State law." To hold that the mere placing on the statute books of a state enactment forbidding "unfair methods of competition" and "unfair or deceptive acts or practices" completely ousts the Commission of jurisdiction, even though the state statute is little more than hortatory in its effect on the interstate aspects of the dissemination of false insurance advertising, would be to impute to Congress a willingness to be satisfied by "regulation" which exists only on paper.

The *National* case illustrates the difficulties of protecting the public if such a construction were adopted by this Court. National disseminates, by mail and other means, advertising material to prospective customers located in all 48 states (as well as the District of Columbia and Hawaii), either directly or through various agents of the company. The problem presented is thus nationwide in its impact, but the states, acting individually, can not adequately cope with this problem. State insurance laws generally do not even purport to regulate the business of insurance beyond the borders of the state (*e. g.*, Insurance Code of Michigan, 1956, c. 20, Sections 24.12001–24.12050; 1955 Supplement to General Statutes of Kansas, Sections 40–2401—40–2414).[28] And,

[28] The Kansas statute, typical of those of the 41 states which have enacted the so-called "Model Unfair Trade Practices bill for Insurance," is reproduced as an appendix, *infra*, pp. 67–80. It provides in Section 40–2401 that the purpose of the Act is to regulate trade practices "by defining, or providing for the determination of, all such practices *in this state* which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so de-

even assuming that these laws did purport to do so, it seems clear that citizens of the other 47 states would not thereby receive adequate protection.

For example, as Congress recognized in enacting the McCarran-Ferguson Act, the Fourteenth Amendment imposes substantial limitations on the power of the states to regulate out-of-state transactions. See, *e. g., Allgeyer* v. *Louisiana,* 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346; *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77; *New York Life Ins. Co.* v. *Head,* 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426. Cf. *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 416. These limitations have not been eliminated as a result of later decisions of this Court. See, *e. g., Osborn* v. *Ozlin,* 310 U. S. 53, 62; *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313. The *Allgeyer, St. Louis Compress,* and *Johnson* cases (*supra*) were cited in the House Report (H. Rep. No. 143, 79th Cong., 1st Sess., p. 3) and by Senator McCarran on the Senate floor (91 Cong. Rec. 1442) as among the "controlling decisions of the United States Supreme Court" setting out the constitutional limitations to which the Act was subject.

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fined or determined." [Emphasis added.] Section 40-2403 provides:

> No person shall engage *in this state* in any trade practice which is defined in this act as, or determined pursuant to this act to be, an unfair method of competition, or an unfair or deceptive act or practice in the business of insurance. [Emphasis added.]

In addition, wholly apart from constitutional limitations, the authorities of the state of origin can hardly be expected to devote their necessarily limited financial and manpower resources to the investigation and prosecution of misrepresentations made to the citizens of the other 47 states. "And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643, 649, citing *Lumbermen's Ins. Co.* v. *Meyer,* 197 U. S. 407, 418–419, and *Mutual Life Ins. Co.* v. *Spratley,* 172 U. S. 602, 619. On the other hand, any attempt by one of the other 47 states to deal inside its boundaries with advertising originating elsewhere would fail to get at the source of the evil; it would deal only with a symptom rather than the cause.

The problem is even more acute where an insurance company employs no local agents and has no office or assets within the state. In those circumstances, there would seem to be no way in which the state can adequately protect its citizens from false advertising disseminated from out-of-state points through the media of the United States mails (as in the instant case), newspapers, magazines, radio, or television.[29] Yet, under the decisions below, the Com-

[29] Compare *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643. There this Court, in connection with an insurer located in Nebraska and engaged in the mail-order health insurance business, held that Virginia "has power to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants

mission is precluded from acting even in that situation, so long as the states involved have enacted legislation relating to insurance advertising.[30] The result, it seems clear, is certainly not the "adequate regulation and control" of the insurance business

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on the Secretary of the Commonwealth." *Id.* at 647. In so holding, the Court placed emphasis on "the unpaid activities of those already members, who are encouraged to recommend the Association to friends and submit their names to the home office." *Id.* at 646, 648. See also the concurring opinion of Mr. Justice Douglas, *id.* at 653–654: "A state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesmen, or solicitors to obtain business for it within the state. Then it is beyond the reach of process. In the present case, however, that is only the formal arrangement. The actual arrangement shows a method of soliciting business within Virginia as active, continuous, and methodical as it would be if regular agents or solicitors were employed."

It should also be noted that the Court recognized that problems might arise as to the "methods by which the state might attempt to enforce [its order]" (*id.* at 651), but found it unnecessary to discuss those problems.

[30] Although the Commission was divided three-to-two as to its jurisdiction in the two cases here, it has unanimously upheld its jurisdiction in other cases involving insurance companies doing business primarily on a mail-order basis. See, *e. g.*, *American Life and Accident* case, *supra*, note 19. Compare *United States* v. *Sylvanus*, 192 F. 2d 96 (C. A. 7), certiorari denied, 342 U. S. 943. There it was held that, irrespective of the McCarran-Ferguson Act, the federal mail-fraud statutes, although not specifically relating to the business of insurance, apply to fraudulent advertising by an accident and health insurance company in a state having a statute prohibiting the use of such advertising within the borders of the state. Implicit in the decision is the view that the federal action did not in any manner "invalidate, impair, or supersede" the state law.

envisioned by Congress. S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2.

C. THE PURPOSE OF THE MCCARRAN-FERGUSON ACT WAS TO REMOVE FEDERAL IMPEDIMENTS TO THE EXECUTION OF STATE POLICIES, AND NOT TO BAR FEDERAL ACTION WHOLLY CONSISTENT WITH SUCH POLICIES

As we have already indicated (*supra,* pp. 35–39), the basic distinction is between (1) state insurance laws sanctioning what federal law forbids and (2) state insurance laws prohibiting what federal law also forbids. We believe that the courts below, in holding that the mere enactment of state insurance laws relating to false advertising precluded Commission jurisdiction, erred in failing to draw this distinction.

As the *North Little Rock* case (*supra,* p. 37) suggests, certain federal laws may be rendered inapplicable by the mere enactment of specific state insurance laws in the first category;[31] for, in that event, there is an obvious collision between federal and state policy and Congress has decreed that state policy should be controlling. But as to the second category, there is no such conflict. Until the state authorities act to apply this common policy to the

[31] Even this statement is subject to the exception in Section 3 (b) as to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." See note 21, *supra.*

same transaction,[32] there would seem to be no substantial reason why the federal and state governments should not both have jurisdiction. Certainly complementary regulation of this nature is in no sense unusual. See, *e. g., Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, and *United States* v. *Public Utilities Commission of California,* 345 U. S. 295, both involving a strikingly similar statutory provision in the Federal Power Act;[33] see also discussion of the Twenty-first Amend-

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[32] See note 24, *supra.* Of course, once the Federal Trade Commission asserts its jurisdiction over the specified practices of a particular insurance company by issuance of a complaint, the Commission would not lose that jurisdiction by the subsequent issuance of a similar complaint by a state agency. Cf. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 196; *Princess Lida* v. *Thompson,* 305 U. S. 456. We do not suggest that the Commission's issuance of a complaint precludes an interested state from instituting a proceeding of its own; the point, rather, is that such state action, in itself, does not affect the Commission's jurisdiction to continue its proceedings. Presumably conventional rules of *res judicata* would eliminate any possibility of conflicting judgments or orders. *Id.* at 465–466.

[33] The provision (16 U. S. C. 824 (a)) states:

> It is hereby declared that the business of transmitting and selling electric energy * * * is affected with a public interest, and that Federal regulation of matters relating to * * * the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.* [Emphasis added.]

In both cases, this Court held that the italicized portion of the quoted provision "cannot nullify a clear and specific grant of jurisdiction [to the Federal Power Commission], even if the particular grant seems inconsistent with the broadly expressed purpose." 324 U. S. at 527; 345 U. S. at 311.

ment and the *Frankfort Distilleries* case, *supra*, pp. 39–41.

To hold that the mere enactment of state laws in the second of the two categories ousts the Commission of jurisdiction is to distort and defeat the purpose of the McCarran-Ferguson Act. As this Court recognized in *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, 429–430, that purpose "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation" and by affirmatively declaring the business of insurance to be subject to state regulation and taxation. Cf. *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.*, 348 U. S. 310, 319. This purpose is completely consistent with, and effectuated by, the Commission's action in undertaking to stop false and misleading advertising in the interstate sale of insurance. Such action, for the reasons already stated (*supra*, pp. 35–39), does not in any way interfere with the execution of state insurance policies. Quite the contrary, federal regulation of this nature serves to supplement the limited power of the states in carrying out those policies.

It is axiomatic that a statute does not exist in a vacuum but represents a concrete response to a particular legislative problem which must be taken into account in construing the statute. "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate

a plan of government." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 538–539. This principle is double-edged in its effect; if consonant with other considerations, the statute should be construed broadly enough to reach the object of legislative concern, but at the same time not so broadly as to cover matters outside the scope of the problem which gave rise to the legislation. In the instant case, there is no basis for believing that Congress, in enacting the McCarran-Ferguson Act, was concerned with a problem of concurrent jurisdiction of federal and state regulatory bodies in areas where no conflict exists. On the contrary, the legislative problem was whether the states should be permitted to continue their regulation of the insurance business and, if so, whether such regulation should yield to *contrary* federal legislation. See *infra,* pp. 59–60. In other words, the problem was whether the states should have jurisdiction, not whether they should have *exclusive* jurisdiction; whether state law should be controlling in the event of a conflict, not whether state regulation should be permitted to "pre-empt" the field even in the absence of a conflict. The Commission's construction of the Act, as we have shown, in no way impinges on Congress' resolution of that problem.

In providing that the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law," Congress was dealing, we think, with mat-

ters of substance and not form,[34] and was referring to "regulation" in fact—*i. e.*, state action which actually takes hold of the conduct involved. In this view, legislation and "regulation" are far from being synonymous.[35] Where, for example, a state law authorizes the maintenance of rate-fixing bureaus and no implementing administrative action is needed, the transaction is "regulated by State law" in a very concrete sense; the statute is self-executing and the regulatory action is implicit in the statute itself. But where a statute, instead of sanctioning a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no "regulation" in fact.

This is especially true where the prohibitory legislation is as general in scope as the state statutes involved in the instant cases. In the language of the Federal Trade Commission Act, these statutes broadly condemn "unfair methods of competition" and "unfair or deceptive acts or practices."[36] Without administrative elaboration of these standards and application in individual cases, such legislation—far from being "regulation" in fact—only

> represents inchoate law in the sense that it does not lay down rules which call for immediate compliance on pain of punishment by

[34] See, *e. g.*, the statement of President Roosevelt (*infra*, p. 65) on signing the bill.

[35] See statement of Senator McCarran (*infra*, pp. 57–58).

[36] See note 23, *supra*.

> judicial process. The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion. The statute, in order to rule any individual case, requires an additional exercise of discretion and that last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.

Mr. Justice Jackson in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 486–487 (dissenting opinion).[37] This Court's description of the Federal Trade Commission is also applicable to the state agencies charged with administering similar statutes: "In administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially."[38]

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[37] It should be noted that in this respect there was no disagreement between Mr. Justice Jackson and the majority opinion.

[38] See also *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347, 356–357: "The truth is, the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by

Humphrey's Executor v. *United States*, 295 U. S. 602, 628. Unless and until this process of "filling in and administering the details embodied by [the] general standard" is consummated in individual cases, to that extent the "business is not regulated by State law." [39]

D. THE LEGISLATIVE HISTORY OF THE MCCARRAN-FERGUSON ACT SUBSTANTIALLY SUPPORTS THE COMMISSION'S CONSTRUCTION

The effect of the McCarran-Ferguson Act, we think, was to authorize the states to continue to tax and regulate the business of insurance, irrespective of restraints upon such taxation and regulation that might flow from the Commerce Clause. But, as we have shown, the Act did not preclude the federal government from cooperating with the states in effectuating regulatory policies common to federal and state governments alike. Though in cases of conflict the policy of regulation was to be established by the states unless Congress specifically provided otherwise, where the purpose to be accomplished by state and federal regulation ran hand in hand, as here, both state laws and the Federal Trade Commission Act were to apply. The legislative history of the McCarran-Ferguson Act supports this construction.

Even before the Supreme Court's decision in the *South-Eastern Underwriters* case, but in anticipa-

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the Board of Trade. * * * it was the intention of the Legislature, having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade."

[39] See note 32, *supra*.

tion of the possibility that the Court might hold the Sherman Act applicable to the business of insurance, three identical bills were introduced in the 78th Congress which would have made the Sherman and Clayton Acts wholly inapplicable to the business of insurance. H. R. 3269; H. R. 3270; S. 1362. These bills provided that nothing contained in the Sherman or Clayton Acts "shall be construed to apply to the business of insurance or to acts in the conduct of that business or in anywise to impair the regulation of that business by the several States." None of these bills was enacted. The Federal Trade Commission Act was not mentioned in these bills or the committee reports. S. Rep. No. 1112, 78th Cong., 2d Sess.; H. Rep. No. 873, 78th Cong., 1st Sess.

The bill (S. 340) that became the McCarran-Ferguson Act was introduced early in the 79th Congress, 1st Session, by Senators McCarran and Ferguson, and was reported favorably by the Senate Judiciary Committee on January 24, 1945. S. Rep. No. 20, 79th Cong., 1st Sess. About the same time, Congressman Walter introduced an insurance bill in the House (H. R. 1973) which was reported favorably by the House Judiciary Committee on February 8, 1945. The McCarran-Ferguson bill was amended on the floor of the Senate and as amended passed the Senate. It was referred in the House to the Judiciary Committee. That Committee struck the entire substance of the bill, substituting therefor the language contained in the Walter bill, and reported S. 340 as thus amended. H. Rep. No. 143, 79th Cong., 1st Sess. The bill as reported passed the House. A Conference Committee

was appointed, composed of Senators McCarran, O'Mahoney, and Ferguson and Congressmen Sumners, Walter, and Hancock. The Conference Committee added to the bill the Section 2 (b) proviso, continuing the application of the Federal Trade Commission Act "to the extent that such business is not regulated by State law." The bill reported by the Conference Committee (H. Rep. No. 213, 79th Cong., 1st Sess.) was passed by both Houses of Congress and approved by the President on March 9, 1945.

The "Statement of the Managers on the Part of the House," attached to the bill reported by the Conference Committee (*id.*, p. 3), is significantly silent on the addition of the Section 2 (b) proviso. And the earlier House and Senate reports on S. 340 declare the purpose "to secure adequate regulation and control of the insurance business" (S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2). As already shown (*supra*, pp. 41–49), "adequate regulation" cannot be accomplished under the construction adopted by the courts below, which, though there is no conflict here between the state laws and the Federal Trade Commission Act, leaves the advertising practices of insurance companies beyond the scope of effective regulation where such companies operate on a nation-wide or multi-state basis.

The courts below relied upon certain general remarks made by Senator McCarran on the floor of the Senate in the course of explaining the changes made by the Conference Committee (A. R. 115–116; N. R.

223–224). But these remarks are in no way inconsistent with the construction urged here. Senator McCarran stated (91 Cong. Rec. 1443):

> During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, *to the extent that they regulate,* they will have taken the business of insurance in the respective States out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable. [Emphasis added.]

Senator McCarran further stated (*ibid.*): "The moratorium would not be continued; but if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective." The latter statement is really neutral in nature, since it merely rephrases the statutory language—namely, that the federal acts are applicable "to the extent that such business is not regulated by State law"; it tells nothing of Senator McCarran's conception of "regulated." But the quoted statement (*supra*) would seem to give affirmative support to the Government's position. It apparently distinguishes—as we have urged above—between legislation and "regulation." According to this statement, the federal acts shall not apply "If they [the states] enact such legislation, *to the extent that they regulate*". (Emphasis added.) Clearly the inference is that the mere enactment of "such legisla-

tion" is insufficient and that it is also necessary "that they regulate."[40]

Senator McCarran's remarks, moreover, must be read in conjunction with the statements of the other draftsmen of the proviso to Section 2 (b). Senator Ferguson, a co-sponsor of the bill and one of the Senate managers, stated (91 Cong. Rec. 1481):

> Mr. FERGUSON. Under the language which is now in the bill as it appears in the conference report, if a State passes an act regulating insurance or taxing insurance, *and that regulation is contrary to the Sherman Act or the Clayton Act,* with three exceptions, then the State law would be the law. * * *
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> * * * * *
>
> In other words, under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the States were specifically to legislate upon a particular point, *and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act,* then the State law would be binding. That is exactly what we attempted to do in the bill. It is clear what we intended to do. * * * [Emphasis added.]

Senator Ferguson also recognized the inherent incapacity of the states adequately to regulate the interstate business of insurance. He stated (91 Cong. Rec. 1484): "If the Senator's statement was that the

[40] See note 32, *supra.*

proposed act would permit a State to regulate interstate commerce—insurance is interstate commerce—in the various States, the State could not do it."

During the Senate debates, no reference was made to the regulation of false and misleading advertising. Rather, the problem to which attention was directed was the impact on the Sherman Act of state laws authorizing conduct (*e. g.*, rate-fixing) which, apart from the McCarran-Ferguson Act, would under *South-Eastern Underwriters* be in violation of the Sherman Act. 91 Cong. Rec. 1442–1444, 1477–1488. But Senator O'Mahoney, one of the Senate managers of the bill, gave specific assurances that the Federal Trade Commission Act and the other Acts referred to in Section 2 (b) would become fully applicable upon the expiration of the moratorium, and that the bill would not delegate to any state the power to legislate in the field of interstate or foreign commerce (91 Cong. Rec. 1483):

> Mr. O'MAHONEY. Mr. President, there is *not a line or sentence in the proposed act,* as I have read it, *which would delegate to any State the power to legislate in the field of interstate and foreign commerce. State regulation must be for the State and not for the United States.* The bill does not sacrifice the power of Congress to regulate in the field of interstate commerce, but, wisely, it seems to me, undertakes to say in effect to the State, "For this period take the responsibility and regulate insurance in the interest of the public."
>
> Mr. PEPPER. Not for this period; but indefinitely.

Mr. O'MAHONEY. For this period so far as the antitrust laws are concerned, it would be a moratorium.

Mr. PEPPER. Oh, we are not talking about a moratorium; we are talking about the period beyond the moratorium.

Mr. O'MAHONEY. Mr. President, the Senator cannot separate his interpretation of the conference report from the word "moratorium." *It is the purpose of the proposed act to grant a moratorium.* It would be an absurd construction to say that in one section of the law a moratorium is provided, but in another section it is provided that there shall be no moratorium.

Within its own boundaries the State may authorize agreements for rate making just as the Congress of the United States, by passing the Interstate Commerce Act, authorized rate making by combinations in the railroad field, and just as practically every State in the Union has authorized public utility rate making within the States. But what I wish to say to the Senator from Florida, and other Senators as well, without any reservation, is this: *When the moratorium period passes, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act come to life again in the field of interstate commerce, and in the field of interstate regulation. Nothing in the proposed law would authorize a State to try to regulate for other States,* or authorize any private group or association to regulate in the field of interstate commerce. [Emphasis added.]

While there was no discussion whatever in the House of the effect of the addition of the proviso to Section 2 (b) by the Conference Committee, it is significant to note that before the conference at least two Representatives expressly stated their desire to continue the application of the Federal Trade Commission Act to false advertising of insurance. Section 3 of both the Senate and House versions of S. 340 before it went to conference fully exempted the business of insurance from the Federal Trade Commission Act and the Robinson-Patman Act. This section, however, was eliminated by the Conference Committee, and the two Acts were included in the provision declaring a moratorium (Section 3 (a)), which in both the Senate and House versions had applied only to the Sherman and Clayton Acts. This action, it seems clear, was taken as a result of the debate in the House on the bill before it went to conference. During this debate, the following statements were made:

> Mr. COCHRAN. Mr. Speaker, I am in favor of giving the insurance companies of the country an opportunity to adjust themselves to the decision of the Supreme Court, but I am not in favor of the House bill as it was reported by the Committee on the Judiciary. If you look at section 3 of the bill you will find that it exempts all the business of insurance companies and agents from the original Federal Trade Commission Act, and all amendments thereto, as well as the Robinson-Patman Act; in my opinion no honorable insurance company or honorable agent would want to be exempted from these acts. It will give an opportunity to fly-by-night insurance agents and companies

to indulge in all the false advertising they desire, and they will be exempt from prosecution if that provision in the bill stands.

* * * * *

I sincerely hope that this matter will be thoroughly considered by the Judiciary Committee and before this bill is called up that the committee will agree to eliminate section 3.

I will not vote for the bill as it was reported by the committee unless section 3 is stricken from the measure. [91 Cong. Rec. 1027–1028.]

* * * * *

Mr. COCHRAN. The gentleman [Mr. Walter] certainly does not want to stand on the floor of this House and tell the Members that he is in favor of insurance companies or insurance brokers putting out false advertising in connection with the conduct of their business.

Mr. WALTER. Well, if they do, it seems to me that is a matter that can be very easily reached. We are not concerned with things of that sort. This is merely a moratorium. That is all it is. It is to give these people a breathing spell so that they can decide how they may operate their business in the future. That is all this is; it is a moratorium.

Mr. COCHRAN. I agree with the gentleman that far, but when he says "we" I do not know for whom he speaks. I, as one Member, will not vote for the moratorium if you leave section 3 in the bill. [91 Cong. Rec. 1086.]

* * * * *

Mr. BAILEY. * * * There is a third major reason why this legislation is objectionable. It creates a "no man's land" zone in which irresponsible, fly-by-night concerns, not able to

> qualify in any State, continue to ply their trade of selling policies through the mails, by newspaper advertising and over the radio. It is estimated that millions of dollars have and are being invested in this worthless form of insurance. These practices are beyond State regulations and are just one more proof that a sizable part of the insurance, if regulated at all, must come under the commerce clause of our Constitution as was recently affirmed by our Supreme Court.
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> * * * * *
>
> * * * Two simple amendments which I shall offer (a) to remove discrimination in rates, (b) to effectively control and safeguard our citizens against fake and worthless insurance, would make this proposed legislation entirely satisfactory. [91 Cong. Rec. 1092.]

Thus the legislative history of the McCarran-Ferguson Act as a whole furnishes substantial support for the Commission's construction of the Act. Senator McCarran's statements are fully consistent with the Government's position. Senator Ferguson, a cosponsor of the Act, indicated that it was only in cases of conflict of policy that state enactments would serve to divest the Commission of interstate jurisdiction over the business of insurance; indeed, Senator Ferguson even disclaimed any intention to let the states regulate interstate commerce at all. Senator O'Mahoney, one of the Senate managers of the bill and as such a coauthor of the proviso to Section 2 (b), assured the Senate that after the expiration of the moratorium the Federal Trade Commission Act would again become fully applicable to the business of insurance.

And members of the House expressed their desire that the application of the Federal Trade Commission Act to false advertising by insurance companies be preserved.

The Commission's construction of the Act is also in accord with the expressed understanding of President Roosevelt in signing the bill into law. The President stated in pertinent part:

> After the moratorium period, the antitrust laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, *and are effectively performing that responsibility,* for the regulation of whatever aspect of the insurance business may be involved * * *."[41] [Emphasis added.]

All of the available evidence indicates, in short, that Congress did not by the McCarran-Ferguson Act intend to oust the Commission of jurisdiction, in the circumstances of these cases, to join with the states in stopping deceptive practices which the states themselves have declared to be unlawful.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed, and the cases remanded to the Courts of Appeals with directions to consider the merits of the Commission's

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[41] White House Press Release, March 10, 1945; 15 L. & Contemp. Prob. 478.

decisions that respondents have engaged in false and misleading advertising practices in violation of the Federal Trade Commission Act.

J. LEE RANKIN,
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EARL E. POLLOCK,
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EARL W. KINTNER,
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Assistant General Counsel,

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Federal Trade Commission.

MARCH 1958.

APPENDIX

1955 SUPPLEMENT TO GENERAL STATUTES OF KANSAS, ARTICLE 24, REGULATION OF CERTAIN TRADE PRACTICES, SECTIONS 40–2401—40–2414

40–2401. PURPOSE OF ACT. The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

40–2402. DEFINITIONS. When used in this act: (a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, mutual nonprofit hospital service corporation, nonprofit medical service corporation, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. (b) "Commissioner" shall mean the commissioner of insurance of this state.

40–2403. UNFAIR METHODS OF COMPETITION OR UNFAIR AND DECEPTIVE ACTS OR PRACTICES; PROHIBITED. No person shall engage in this state in any trade practice which is defined in this act as, or determined pursuant to this act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

40-2404. SAME; CERTAIN METHODS, ACTS OR PRACTICES DEFINED AS UNFAIR. The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) *Misrepresentations and false advertising of policy contracts.* Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement which is misleading or misrepresents the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statements as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) *False information and advertising generally.* Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) *Defamation.* Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) *Boycott, coercion and intimidation.* (a) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance, or (b) by any act of boycott, coercion or intimidation monopolizing or attempting to monopolize any part of the business of insurance.

(5) *False financial statements.* (a) Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive. (b) Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its conditions or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) *Stock operations and advisory board contracts.* Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance: *Provided,* That nothing herein shall prohibit the acts permitted by section 40–232 of the General Statutes of 1949 or any amendments thereto.

(7) *Unfair discrimination.* (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) *Rebates:* (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not speci-

fied in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract. (b) Nothing in subsection 7 or paragraph (a) of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance: *Provided,* That any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year: *Provided,* That nothing in this act shall prohibit the issuance of policies containing benefits set out in section 40–430 of the General Statutes of 1949 or any amendments thereto.

(9) *Statutory violations.* Any violation of any of the provisions of sections 40–1409 or 40–1515 of the General Statutes of 1949 or any amendments thereto.

40-2405. SAME; POWER OF COMMISSIONER. The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section 3 [40-2403] of this act.

40-2406. SAME; POWERS AND DUTIES AS TO HEARINGS; SERVICE OF PROCESS. (a) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in section 4 [40-2404] of this act, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten (10) days after the date of the service thereof. (b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person. (c) Nothing contained in this act shall require the observance at any such hearing of formal rules of pleading or evidence. (d) The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers,

records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the district court of Shawnee county or the county where such party resides, on application of the commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof. (e) Statements of charges, notices, orders, and other processes of the commissioner, under this act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement notice, order or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

40–2407. SAME; CEASE AND DESIST ORDERS. (a) If, after such hearing, the commissioner shall determine that the method of competition or the act or practice in question is defined in section 4 [40–2404] and that

the person complained of has engaged in such method of competition, act or practice in violation of this act, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice. (b) Until the expiration of the time allowed under subsection (a) of section 8 [40–2408] of this act for filing a petition for review if no such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the district court, as hereinafter provided, the commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section. (c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

40–2408. SAME; JUDICIAL REVIEW OF CEASE AND DESIST ORDERS. (a) Any person required by an order of the commissioner under section 7 [40–2407] of this act to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in section 4 [40–2404] may obtain a review of such order by filing in a court of competent jurisdiction of this state, within sixty (60) days from the date of the service of such order, a written petition praying that the order of the commissioner

be set aside. A copy of such petition shall be forthwith served upon the commissioner, and thereupon the commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by evidence, shall be conclusive. (b) To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which if supported by evidence shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order, with the return of such additional evi-

defense. (c) A cease and desist order issued by the commissioner under section 7 [40–2407] of this act shall become final: (1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time, except that the commissioner may thereafter modify or set aside his order to the extent provided in subsection (b) of section 7 [40–2407] of this act; or (2) upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed. (d) No order of the commissioner under this act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

40–2409. SAME; METHODS, ACTS OR PRACTICES NOT DEFINED; PROCEDURE. (a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in section 4 [40–2404], that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten (10) days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section 6 [40–2406] of this act. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person. (b) If such report charges a violation

of this act and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after ten (10) days after the service of such report cause a petition to be filed in a court of competent jurisdiction of this state within the district wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public *pendente lite.* (c) A transcript of the proceedings before the commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence. (d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by evi-

dence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

40–2410. SAME; JUDICIAL REVIEW BY INTERVENOR, WHEN. If the report of the commissioner does not charge a violation of this act, then any intervenor in the proceedings may within thirty (30) days after the service of such report, cause a petition to be filed in the district court of Shawnee county for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this act.

40–2411. SAME; PENALTIES FOR VIOLATION OF CEASE AND DESIST ORDERS. Any person who violates a cease and desist order of the commissioner issued under section 7 [40–2407], after it has become final, and while such order is in effect, shall, upon proof thereof to the satisfaction of the court, forfeit and pay to the state of Kansas a sum not to exceed one thousand dollars ($1,000), as determined by the court, for each violation, which may be recovered in a civil action, except that, if such violation is found to be willful, the amount of such penalty shall be a sum not to exceed five thousand dollars ($5,000), and it shall be the duty of the attorney general to prosecute for the recovery of such forfeitures; and in addition thereto, any violation of a cease and desist order of the commissioner issued under section 7 [40–2407] of this act, after it has become final, and while such order is in effect, by any insurance company or agent licensed in this state shall be sufficient ground for the revoca-

tion by the commissioner of the certificate of authority of such company or license of such agent.

40-2412. SAME; PROVISIONS ADDITIONAL TO EXISTING LAW. The powers vested in the commissioner by this act, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

40-2413. SAME; IMMUNITY FROM PROSECUTION, WHEN. If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding: *Provided, however,* That no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this state. Any such individual may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immunity or privi-

lege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

40–2414. SAME; INVALIDITY OF PART. If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

U. S. GOVERNMENT PRINTING OFFICE: 1[illegible]